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No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
FEDERAL ENERGY REGULATORY COMMISSION, AND
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petition for Certiorari

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August 2, 1984

QUESTIONS PRESENTED

1. Did the court of appeals exceed the proper scope of judicial review of an agency's selection of a ratemaking methodology when it rejected the ratemaking methodology selected by the Federal Energy Regulatory Commission for oil pipelines?

2. Does the Interstate Commerce Act prohibit the Federal Energy Regulatory Commission from using the ratemaking methodology it has selected for oil pipelines?

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the court of appeals:

ARCO Pipe Line Company
Association of Oil Pipe Lines
Belle Fourche Pipe Line Company
Buckeye Pipe Line Company
Farmers Union Central Exchange, Inc.
Farmland Industries, and its subsidiary CRA, Inc.
Federal Energy Regulatory Commission
Getty Pipeline, Inc.
Hydrocarbon Transportation, Inc.
Kerr McGee Refining Corporation
Land O'Lakes, formerly Midland Cooperatives, Inc.
Marathon Pipe Line Company
Mid-America Pipeline Company
National Cooperative Refining Association
Phillips Pipe Line Company
Sun Pipe Line Company
Texas Eastern Transmission Corporation
United States of America
Williams Pipe Line Company

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UNITED STATES OF AMERICA,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

Texas Eastern Transmission Corporation ("Texas Eastern")[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 734 F.2d 1486 and is reproduced as Appendix A in the separately bound Appendix. The order of the Federal Energy Regulatory Commission ("FERC" or "Commission") is reported at 21 FERC (CCH) ¶ 61,260 and is reproduced as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1984. See Appendix C. Petitions for rehearing were denied on May 4, 1984. See Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350.

[1] Texas Eastern's parent company is Texas Eastern Corporation.

STATUTES INVOLVED

The principal statute involved is Section 1(5) of the Interstate Commerce Act ("Act"), 49 U.S.C. § 1(5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Also relevant are other sections of the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Pertinent portions of these statutes are reproduced in Appendix E.

STATEMENT OF THE CASE

By virtue of the Hepburn Amendment of 1906, which extended the coverage of the original Act to Regulate Commerce to include the transportation of commodities[2] by pipeline, oil pipelines are subject to the rate provisions of the Interstate Commerce Act. Oil pipeline regulation has traditionally bred little controversy, as evidenced by the almost total absence of shipper complaints. In fact, the instant proceedings represent the first comprehensive consideration of oil pipeline rates by the responsible agency[3] in a generation.[4]

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[2] Except water and natural or artificial gas.

[3] Jurisdiction over oil pipeline rates was transferred from the Interstate Commerce Commission ("ICC") to the Federal Energy Regulatory Commission by the Department of Energy Organization Act in 1978. *See* 42 U.S.C. § 7172(b). In fact, the ICC had rendered a decision in this proceeding which was on appeal when jurisdiction was transferred, leading the court of appeals to remand the matter to the FERC so that it might "begin its regulating duties in this area with a clean slate." *See Petroleum Products, Williams Brothers Pipeline Co.*, 355 I.C.C. 479 (1976), *remanded, Farmers Union Central Exchange* v. *FERC*, 584 F.2d 408, 421 (D.C. Cir.), *cert. denied*, 439 U.S. 995 (1978).

[4] The last oil pipeline rate decisions were in the 1940's. *See Reduced Rates and Gathering Charges*, 243 I.C.C. 115 (1940), *reopened*, 272 I.C.C. 375 (1948); *Petroleum Rail Shippers Association* v.

What had begun as a shipper protest to a rate increase filed by the Williams Brothers Pipeline Company ("Williams"), *see Petroleum Products, Williams Brothers Pipeline Co.*, 355 I.C.C. 479 (1976), *remanded, Farmers Union Central Exchange v. FERC*, 584 F.2d 408 (D.C. Cir.), *cert. denied*, 439 U.S. 995 (1978), developed into a generic reconsideration of oil pipeline ratemaking by the FERC. Although a number of different approaches to oil pipeline rates were suggested by the parties, essentially two contending methodologies emerged. One was the type of analysis traditionally used under federal statutes regulating utility rates, in which the return on capital component of rates is calculated by multiplying the depreciated original cost of the facilities dedicated to public service by the lowest rate of return consistent with the "taking" clause of the Fifth Amendment to the United States Constitution. The other was an approach referred to as "valuation", which takes the present value, as well as the original cost, of facilities dedicated to public service into account in determining rates. This approach had been used in the regulation of oil pipelines since the 1940's.

The issues involved in the choice of a ratemaking methodology for oil pipelines were exhaustively explored in hearings held before an administrative law judge. These hearings extended over 59 days in 1979 and produced a record consisting of 8000 pages of transcript including 500 exhibits. The Commission dispensed with an initial decision by the presiding judge, and considered the record itself.

The Commission's opinion discussed the relative merits of the contending methodologies in detail. After extensive consideration of the purpose of the governing statute, the history of the industry, and present economic conditions in the industry, the Commission concluded that oil pipeline rates should be regulated under a standard of ordinary commercial reasonableness.

Alton & Southern Railroad, 243 I.C.C. 589 (1941); *Minnelusa Oil Corp. v. Continental Pipeline Co.*, 258 I.C.C. 41 (1944).

It rejected traditional utility rate regulation, which had never been applied to oil pipeline rates, and which the Commission found unsuited to the oil pipeline industry. 21 FERC ¶ 61,260 at 61,597, App. B-128.

The Commission therefore elected to continue to determine rate base by use of the valuation approach, 21 FERC ¶ 61,260 at 61,632, App. B-233-34, but adopted a new method for fixing a rate of return. 21 FERC ¶ 61,260 at 61,645, App. B-274-76. The FERC found an original cost approach inappropriate since oil pipelines are not public utilities with guaranteed markets, but rather can enter and leave markets without regulatory approval. Because the original cost approach fails to take into account increases in the value of facilities after their initial installation, it would result in rates that are relatively high early in the life of a pipeline but decline to rather low levels later in the pipeline's life. This could create a dilemma for a new pipeline attempting to enter a market in which other pipelines had operated for some time. The newer line might not be able to collect its theoretically allowed rate in competition with the older lines, resulting in undercollection over the life of the line, and thereby erecting a barrier to entry and new investment. 21 FERC ¶ 61,260 at 61,626-28, App. B-218-31.

In contrast, valuation methodology, which takes into account facilities' present value and the cost of reproducing them, would result in more level rates over the life of a facility. Moreover, as the approach that had been in use long before the FERC had assumed jurisdiction over oil pipelines, its continuance would avoid frustration of investor expectations. 21 FERC ¶ 61,260 at 61,626, App. B-216.

The Commission adopted a new approach to determining the proper rate of return to apply to the rate base. The rate of return was to consist of three components: the cost of debt, a suretyship premium to compensate guarantors of that debt, and a "real entrepreneurial" rate of return. The last of these components

requires some explanation. Under traditional utility rate analysis, the object is to approximate the minimum rate of return consistent with the constitutional requirement that rates not be so low as to constitute confiscation of property dedicated to public service. Thus the regulator seeks to set a rate that compensates investors for the risks to which their capital is subject — determined by reference to returns realized on investments in other enterprises of equal risk — and no more. *See, e.g., Bluefield Water Works & Improvements Co.* v. *Public Service Commission*, 262 U.S. 679, 692-93 (1923); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944).

The Commission concluded that such regulation of oil pipeline rates is unnecessary to protect consumers, and that the rates of return provided by such regulation would not be sufficient to attract levels of investment in pipeline facilities commensurate with the public interest. 21 FERC ¶ 61,260 at 61,623-25, App. B-205-12. It therefore chose to allow pipeline returns at commercially reasonable levels set by reference to returns realized on investments that would compete with oil pipelines for capital. The Commission specified several indices by which these returns could be gauged. 21 FERC ¶ 61,260 at 61,645, App. B-274-75. Of course, the nominal returns on competing investments would not be used, but would be adjusted to reflect the extent to which inflation had already been taken into account in computing a valuation rate base. 21 FERC ¶ 61,260 at 61,646, App. B-278.

The Commission remanded the case to an administrative law judge to hold further hearings to determine whether Williams' rates were just and reasonable under the principles laid down by the Commission. Before such hearings could be held, and thus before the Commission had set specific rates for Williams, its decision regarding ratemaking methodology was appealed. The

appeals were consolidated in the Court of Appeals for the District of Columbia Circuit[5]. Thus, the court of appeals did not have before it an example of the end result that the Commission's methodology would produce, but rather was called upon to consider the appropriateness of the methodology *in vacuo*.

The court of appeals held that the Commission's approach was inconsistent with the Interstate Commerce Act. *See Farmers Union Central Exchange, Inc.* v. *FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984), App. A-30. It found that the Commission's methodology would necessarily permit rates outside the "zone of reasonableness" set by the Act because of the FERC's focus on rates sufficient to encourage investment and because of the FERC's belief that its primary mission was to prevent overreaching and abuse of market power rather than to set the lowest compensatory rates. 734 F.2d at 1497-98, App. A-23.

As an independent basis for its rejection of the FERC's approach to ratemaking, the court of appeals found that the FERC's choice of methodology lacked a reasoned basis. 734 F.2d at 1510, App. A-50. The court of appeals stated that the FERC had not explained to the court's satisfaction the FERC's reasons for declining to switch to an original cost rate base approach. 734 F.2d at 1512, App. A-54-55. Nor was the court persuaded by the Commission's reasons for adopting a market-oriented rate of return methodology. 734 F.2d at 1522, App. A-75.

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[5] The court of appeals had jurisdiction pursuant to Section 502(a) of the Department of Energy Organization Act, 42 U.S.C. § 7192(a) and 28 U.S.C. §§ 2321 and 2342.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is in Conflict with the Decisions of this Court Governing the Scope of Review of the Decisions of a Ratemaking Agency.

Because the court of appeals had no rate to examine and no record applicable to a specific regulated company it could not conclude whether rates determined by the Commission's methodology would be reasonable or not. Thus the only fair reading of the court's decision is that it presumes to tell the FERC that it cannot select a particular ratemaking methodology, regardless of the reasonableness of the specific rate that methodology might produce. This action is directly contrary to the principle, enunciated in numerous decisions of this Court, that it is not the function of a reviewing court to substitute its judgment for that of a ratemaking agency on the question of the methodology to be used for ratemaking, so long as the end result is reasonable.

The Administrative Procedure Act defines the scope of the courts' review of decisions by administrative agencies. It states that agency action may be set aside only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court has explained that a court may not substitute its own judgment for that of an administrative agency, *see Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2866 (1983), but that the court is limited to determining whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made. *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974). This type of deference is particularly appropriate where technical matters peculiarly within the expertise of the agency are concerned. *See Baltimore Gas & Electric Co.* v. *NRDC*, 103 S. Ct. 2246, 2256 (1983).

The selection of a methodology for evaluating rates by a ratemaking agency is just such an exercise of technical expertise. Consequently, this Court has consistently stated that the scope of a court's review of an agency's exercise of its ratemaking authority is very narrow. As the Court held in *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800 (1973):

> decisions . . . in rate cases . . . are not be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

Id. at 806 (quoting *Manufacturers Railway* v. *United States*, 246 U.S. 457, 481 (1918)). *See also Illinois Central Railroad* v. *Norfolk & Western Railway*, 385 U.S. 57, 66, 69 (1966); *Indiana Harbor Belt Railroad* v. *General American Transportation Corp.*, 577 F.2d 394, 397 (7th Cir. 1978).

But not even the narrow scope of review applicable to rate orders is appropriate where, rather than actually setting a rate, the agency has merely made a policy choice by selecting a methodology to evaluate rates. This Court has stated that reviewing courts

> may not impose methods of regulation upon the discretion of the Commission; for purposes of judicial review, the validity of a rate order is determined by 'the result reached, not the method employed.'

Permian Basin Area Rate Cases, 390 U.S. 747, 775 (1968) (quoting *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)). *See also Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304 (1933) (reviewing order of state utility commission); *San Diego Land & Town Co.* v. *Jasper*, 189 U.S. 439, 446 (1903) (same).

Thus, the court may not pass on the merits of the particular ratemaking methodology selected by the agency. As the Court

held in the context of ratemaking under the Natural Gas Act, "[r]atemaking agencies are not bound to the service of any single regulatory formula." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968) (citing *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). *See also Wisconsin* v. *FPC*, 373 U.S. 294, 309 (1963); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945).

Deference to the FERC is particularly appropriate in this case. The Commission's opinion represents the first comprehensive consideration of oil pipeline rate methodology in forty years. The opinion is a conscientious attempt to devise an appropriate regulatory methodology for an industry which is very different from the others regulated by the Commission and which has itself changed drastically since the Interstate Commerce Act was enacted. Under such circumstances the agency charged with the regulatory responsibility must be given the freedom to exercise that responsibility creatively, rather than being narrowly confined to the traditional methods of regulating the rates of public utilities. As this Court has said,

> the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.

Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968).

Interference by the courts is especially inappropriate at this stage in view of the fact that the Commission has expressed a willingness to make modifications to its methodology if experience shows that such modifications are desirable. 21 FERC ¶ 61,260 at 61,632, App. B-232-35. *See Second National Natural Gas Rate Cases*, 567 F.2d 1016, 1031 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1077 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976); *United States* v. *CAB*, 511 F.2d 1315 (D.C. Cir. 1975); *Public Service Commission* v. *FPC*, 467 F.2d 361, 371 (D.C.

Cir. 1972); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 633 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

2. The Decision of the Court of Appeals Erroneously Interprets the Interstate Commerce Act.

The court of appeals has held that the Interstate Commerce Act prohibits use of the ratemaking methodolgy adopted by the Commission. The court's analysis appears to proceed from the premise that original cost rate base is presumptively valid, that the term "just and reasonable" limits rates to the minimum consistent with the Constitution, and that there must be compelling evidence for any departure from these principles. This is an erroneous interpretation of the Act.

The Commission's ratemaking authority under Section 1(5) of the Act, 49 U.S.C. § 1(5), which requires that rates be "just and reasonable," is intentionally broad. The court of appeals was incorrect in relying on the gloss that has been put on the term "just and reasonable" as it is used in other statutes in order to reject the standard of commercial reasonableness in favor of the minimum compensatory rate. First, reference to such statutes is inappropriate because none is *in pari materia* with the Hepburn Amendment. *See* 2A C. Sands, *Sutherland Statutory Construction* 298-300 (4th ed. 1973). The other federal ratesetting statutes that contain the terms "just and reasonable" deal with different subject matters and have different preenactment histories and must therefore be interpreted in a manner consistent with the specific evils at which they were aimed. 2A C. Sands, *Sutherland Statutory Construction* 191 (4th ed. 1973). The Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, and Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, for example, were Depression era measures designed to reduce rates to consumers, *see e.g., Sunray Mid-Continent Oil Co.*, v. *FPC.*, 364 U.S. 137, 147 (1960) ("the primary aim of the Natural Gas Act was 'to protect consumers' "), while the provisions of the Interstate Commerce Act dealing with oil pipelines were intended to curtail the predatory

practices of oil pipelines on crude oil producers and refiners. *See The Pipe Line Cases*, 234 U.S. 548, 558-59 (1914); *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951).

Even if reference to other federal ratesetting statutes employing the term "just and reasonable" were proper, the FERC's authority to select a methodology for the regulation of rates under the Act would not be limited to the use of original cost rate base and the minimum compensatory rate of return. Those statutes have not been interpreted as requiring the use of any particular ratesetting methodology. For example, in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944), and *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), this Court stated that the Natural Gas Act does not mandate the use of any particular formula. *See also American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 103 S. Ct. 1921, 1928-29 (1983) (Use of "just and reasonable" in Public Utilities Regulatory Practices Act does not mandate a cost of service approach to rates.).

Thus, the term "just and reasonable" as used in other statutes has not been uniformly interpreted as requiring the use of an original cost rate base. *See FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586-87 (1942) (upholding rate base that included, in addition to original cost, the cost of reproduction). *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968) (upholding area rate regulation without reference to original cost of rate base); *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (Commission not bound "rigidly to a cost-based determination of rates"); *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 308 (1974) (same).

Nor have those statutes been interpreted as always requiring that allowed rates of return be strictly limited to the lowest constitutionally permissible rate. While this Court has found in the Constitution a floor on the rates of return that may be set pursuant to statutes employing the "just and reasonable" formula,

see Bluefield Water Works & Improvement Co. v. *Public Service Commission*, 262 U.S. 679, 692-93 (1923); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944), it has never found that the constitutional minimum is also a rigid ceiling on the level of return that may be allowed under the "just and reasonable" standard. This Court has held under the Natural Gas Act that a rate of return higher than the constitutional minimum may be required to spur investment. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 797-98 (1968) (approving incentive rate to promote natural gas exploration and development). *Accord Second National Natural Gas Rate Cases*, 567 F.2d 1016, 1059 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

Nor does judicial and administrative interpretation of the Interstate Commerce Act indicate that the term "just and reasonable" in that Act requires the use of original cost rate base and the lowest constitutionally permitted rate of return. Indeed, the Act has not even been interpreted as requiring a cost of service approach. For example, the value of the service to be rendered to the shipper has been held to be a factor to be considered in setting a railroad rate under the Act. *See ICC* v. *Chicago Great Western Railroad*, 141 F. 1003, 1015 (D. Ill. 1905), *aff'd*, 209 U.S. 108 (1908). *See also Fifteen Per Cent Case, 1931*, 178 I.C.C. 539, 564-65 (1931) (value of service a consideration). Various other techniques of evaluating rates that are not based on a strict use of rate base and rate of return methodology have also been employed from time to time, such as considering the ratio of net income to total revenues or the ratio of operating income to fixed charges that a set of rates would produce, *see Increased Freight Rates, 1951*, 284 I.C.C. 589, 604-07 (1952), *modified*, 297 I.C.C. 17 (1955), or the effect of the rates on the growth of a city. *See ICC* v. *Southern Railway*, 117 F. 741, 744 (W.D. Va. 1902), *aff'd*, 122 F. 800 (4th Cir. 1903). *See also Net Investment — Railroad Rate Base & Rate*

of Return, 345 I.C.C. 1494, 1565 (1976) ("Return on net investment is merely one of the many criteria that can be applied.").

Nor has strict original cost rate base always been used when return on rate base has been considered in setting rates. Various formulations of valuation rate base have been used to evaluate railroad rates. *See, e.g., ICC* v. *Southern Railway*, 117 F. 741, 745 (W.D. Va. 1902), *aff'd*, 122 F. 800 (4th Cir. 1903); *Increased Freight Rates, 1951*, 284 I.C.C. 589, 607 (1952), *modified*, 297 I.C.C. 17 (1955). *Cf. Net Investment — Railroad Rate Base & Rate of Return*, 345 I.C.C. 1494, 1518-19 (1976) (discussing history of ICC rate base methodology). And, of course, the ICC never used original cost principles to regulate oil pipelines. *See Reduced Pipeline Rates and Gathering Charges*, 243 I.C.C. 115, 141-42 (1940), *reopened*, 272 I.C.C. 375 (1948); *Petroleum Rail Shippers Association* v. *Alton & Southern Railroad*, 243 I.C.C. 589, 663 (1941); *Minnelusa Oil Corp.* v. *Continental Pipeline Co.*, 258 I.C.C. 41, 53 (1944).

Nor has the Act been interpreted as limiting return on rate base to the constitutional minimum. *See, e.g., Increased Class and Commodity Rates, Transcontinental*, 326 I.C.C. 397, 406 (1966), *vacated sub nom. Ringsby Truck Lines, Inc.* v. *United States*, 263 F. Supp. 552 (D. Colo. 1967), *vacated*, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974) ("not our intention to require carriers to maintain rates at the lowest possible level"); *Increased Freight Rates, 1951*, 297 I.C.C. 17, 49 (1955); *The Five Per Cent Case*, 31 I.C.C. 351, 359-60 (1914). The ICC has acknowledged that its practice of setting uniform rates for a number of railroads in one proceeding results in some railroads earning returns in excess of the minimum that must be allowed. *Increased Freight Rates, 1951*, 297 I.C.C. 17, 49 (1955).

Certainly Congress has been aware of how the "just and reasonable" standard set forth in the Act has been interpreted. Yet it has never amended the Act or otherwise indicated that the

Act requires original cost rate bases and minimum constitutionally permitted rates of return. It had ample opportunity to do so, for it has amended, *see, e.g.*, 49 U.S.C. § 1(5)(b), recodified, *see* 49 U.S.C. § 10701(a), and transferred functions under, *see* 42 U.S.C. § 7172(b), the Act since these interpretations were rendered. Under these circumstances Congress must be viewed as having indicated its acceptance of the proposition that the Act is to be interpreted flexibly, and does not prescribe a particular regulatory methodology. *See Bob Jones University* v. *United States*, 103 S. Ct. 2017, 2033 (1983); *Haig* v. *Agee*, 453 U.S. 280, 300 (1981) ("congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy"); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-66 (1951); 2A C. Sands, *Sutherland Statutory Construction* 261-62 (4th ed. 1973).

The opinion of the court of appeals runs directly counter to the broad and flexible requirements of the Interstate Commerce Act. The court of appeals stopped just short of holding that the Interstate Commerce Act requires use of original cost rate base, prohibits the use of a valuation rate base, and prohibits the use of a rate of return geared to making investment in oil pipelines competitive with other investment opportunities. The court of appeals, in the mistaken belief that the Interstate Commerce Act requires that rates of return be pushed to the constitutional minimum, repeatedly returns to the concept that a risk analysis of the type described by this Court's decisions defining the constitutional floor on ratemaking must be performed. *E.g.*, 734 F.2d at 1502, App. A-32-33. Similarly, by finding repeated fault with the FERC's reasons for rejecting original cost rate base, the court of appeals has attempted to dictate that the Commission use such an approach, *e.g.*, 734 F.2d at 1511-12, App. A-52-55, when in fact the Interstate Commerce Act does not even require a cost of service methodology, much less any particular formulation of rate base.

3. This Case Is Critical to the Nation's Energy Transportation Network.

This case is of great practical significance to the national economy. The central role of petroleum and petroleum products to the United States' economy hardly needs elaboration. An adequate and efficient petroleum transportation network is therefore of immense importance to the nation.

Petroleum pipelines have figured prominently in this transportation network. In 1982, for example, they accounted for 47 per cent of the ton-miles of crude petroleum and petroleum products transported domestically. *See* Association of Oil Pipelines, *Shifts in Petroleum Transportation* (1984). In 1981 the 172,800 miles of oil pipelines subject to the jurisdiction of the FERC had total operating revenues of $6.68 billion. Bureau of Census, United States Department of Commerce, *Statistical Abstract of the United States, 1984* at 629 (104th ed. 1983).

During the history of oil pipeline regulation investment has generally been sufficient to meet demand. Moreover, daring projects such as the Trans Alaska Pipeline System have been undertaken to assure the most complete exploitation of domestic petroleum resources possible. At the same time producer and refiner protests have been virtually nonexistent. The Commission's decision represents a considered attempt to assure that pipeline investment remains adequate, while protecting shippers.

The opinion of the court of appeals, however, would tamper with this established system. It would uncritically impose regulatory principles, developed in dissimilar contexts, upon oil pipelines. It would thereby seriously disrupt investor expectations, and discourage investment in oil pipelines, to the ultimate detriment of the national economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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